IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, and others, *Appellants*, against G. A. F. SEELIG, INC., *Respondent*.	*No. 604.*
G. A. F. SEELIG, INC., *Appellant*, against PETER G. TEN EYCK, as Commissioner, etc., and others, *Respondents*.	*No. 605.*

REPLY BRIEF.

The main purpose of this brief is to limit the constitutional issues presented by the Brief for the Appellee. Two other topics suggested by that brief will be commented upon.

A.

Point III of the Brief for the Appellee (pages 13-15) should be ignored. No such issue was presented to

the District Court or by the assignment of errors before this Court. The bill of complaint at paragraph "Fifteenth" refers to Order 33. (R. 6-7.) At paragraph "Thirtieth", subdivision "C", there is some reference to the Fourteenth Amendment and to deprivation of the benefits of certain contracts, but the charge is made against the statute. (R. 12.) The only allegation of the bill of complaint about the contracts is found in the second sentence of paragraph "Eighth". (R. 4; compare, R. 30-31, 42, 45-47.) The answering affidavit said:

> "G. A. F. Seelig, Inc., does not object to paying Seelig Creamery Corporation the amounts required to comply with Official Order Number 33 and the other orders mentioned above; at least it did comply with them by an additional payment in November 1933 after its non-compliance was called to its attention by suit. Apparently its unwillingness relates entirely to payments from Seelig Creamery Corporation to producers, and the two corporations insist upon the right of selling in New York City, after it has come to rest there, milk purchased from Vermont producers at prices less than must be paid by competitors buying from New York State producers." (R. 44-45.)

We believe that G. A. F. Seelig, Inc., assented to that statement and nothing more was heard in the District Court about any grievance because the statute and Order 33 or either of them required G. A. F. Seelig, Inc. to pay Seelig Creamery Corporation more than was required by contract. The District Court in its opinion took no notice of any such grievance. (R. 49-56.) It was not considered in drafting the findings. (R. 57-63.) No relief from it was asked or obtained in connection with the injunction. (R. 64-65.) The as-

signment of errors suggests no issue except what appears from the opinion. (R. 66-67.)

Now by its Point III the Appellee says that it has been complying with Order 33, by making extra payments to Seelig Creamery Corporation and others, and it attempts to set that matter up as a grievance under the Fourteenth Amendment. If the regulation of prices is otherwise constitutional the existence of a contract is no obstacle. *Sproles v. Binford*, 286 U. S. 374, 390-391. Moreover, payment from one pocket of Walter J. Seelig to another under such duress as is afforded by an invalid statute or order is not a ground for granting an injunction. It is respectfully submitted that there is no need to go into those matters, because the issue was not pressed below or by assignment of errors before this Court.

B.

The Appellee and Seelig Creamery Corporation are two separate corporations, the latter entirely owned by Walter J. Seelig and the former owned 62½ per cent by him and 37½ per cent by Gustav R. Seelig. The two corporations share offices in New York City and share the services of Walter J. Seelig as treasurer. (finding 13, R. 59.) At page 14 of Appellee's brief it is said:

> "Appellee has no contract whatsoever with the producers who supply the creameries in Vermont. Neither is appellee in a position to insist that said creameries pay their producers such prices as may be fixed by the New York Milk Control Board. • • • Concededly the Vermont creameries are not paying their producers the New York classified price. It must also be conceded that appellee cannot enforce such payments."

As a practical proposition we doubt if the Court will be much impressed with the argument that Walter J. Seelig and Gustav R. Seelig, doing business under the corporate form of G. A. F. Seelig, Inc., are unable to control the conduct of Walter J. Seelig, sole owner of Seelig Creamery Corporation. *Western Dist. Corp. v. P. S. C.*, 285 U. S. 119. However, we do not care for any victory based upon such a narrow reason. Let it be assumed that the relations between the two corporations are only those of a Vermont corporation buying milk from producers in Vermont, and selling and delivering there daily to a New York corporation. Even so, if it is determined that the statute is valid there will be no practical difficulty about complying with it. It already is covered by paragraph 6 of the contract between the Seelig corporations:

> "The Seller agrees that all products are to be up to the standards of the New York Board of Health requirements, and such products to be legal for sale in the New York City market." (R. 46.)

C.

Although our earlier brief has shown that the statute is not discriminatory (Appellants' brief, pages 14-16) that matter is so important we cannot ignore the following statement from page 18 of Appellee's brief:

> "The real purpose of the New York milk statute in question is, we contend, to force all New York milk dealers to purchase their milk from New York producers, and thus eliminate all foreign competitors of the New York producer from that market to which the New York farmer contends, through his legislature, he has first right."

The New York farmer may sometimes make such a contention, but not through his legislature. This stat-

ute concedes to Vermont farmers everything that it claims for New York farmers. It denies all of them the right to sell to New York consumers milk for which the producer has been paid less than a certain minimum price, identical for New York farmers and for farmers of other States. The only thing denied to Vermont farmers is to compete with New York farmers for New York markets upon terms which are thought to be so dangerous to New York consumers that they are forbidden to New York farmers. The only thing denied to Mr. Seelig and his two corporations (turning now to his real grievance instead of the one he professes) is to take a profit forbidden to dealers in New York milk, under conditions which make the excessive profit a public menace.

JOHN J. BENNETT, JR.,
Attorney General of New York State.

HENRY EPSTEIN,
Solicitor General.

HENRY S. MANLEY,
Counsel for N. Y. S. Department of Agriculture and Markets.

Solicitors for Appellants in No. 604, and for Respondents in No. 605.